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SUSAN H. ROSENAU

JUL - 1 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

July 1, 1993

***By Hand Delivery***

Mr. William F. Caton

Acting Secretary

Federal Communications Commission

Washington, D.C. 20554

OUR FILE NO.

0992-102-60

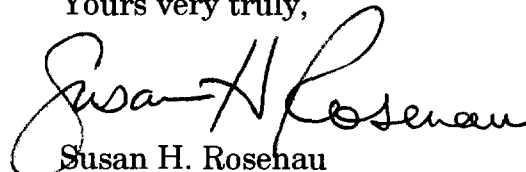
RE: MM Docket No. 93-42, Calistoga, California

Dear Mr. Caton:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of its Second Motion to Strike in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,

  
Susan H. Rosehau

Enclosures (6)

cc: Moonbeam, Inc.  
Larry Miller, Esquire  
A. Wray Fitch, Esquire  
Administrative Law Judge Edward LutonNo. of Copies rec'd  
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JUL - 1 1993

Before The

**Federal Communications Commission**

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications Of	)	<b>Docket No. MM 93-42</b>
	)	
MOONBEAM, INC.	)	File No. BPH-911115MG
	)	
GARY E. WILLSON	)	File No. BPH-911115MO
	)	
For a Construction Permit for a	)	
New FM Station on Channel	)	
265A in Calistoga, California	)	

To: The Honorable Edward Luton  
Administrative Law Judge

**Second Motion to Strike**

Pursuant to Sections 1.45 and 1.229 of the Commission's Rules, Moonbeam, Inc. ("Moonbeam"), by its attorneys, respectfully submits this Motion to Strike the Reply to Opposition to Second Petition to Enlarge Issue filed by Gary Willson ("Willson") on June 15, 1993, stating in support thereof as follows:

1. In his May 14, 1993 Petition to Enlarge, Willson sought to add a financial qualification issue and a false financial certification issue against Moonbeam, Inc., to wit:

1. To determine whether Moonbeam, Inc. is financially qualified to construct and operate the proposed new FM station in Calistoga and, if not, the effect thereof on Moonbeam's basic qualifications to be a Commission permittee/licensee.

2. To determine whether Moonbeam, Inc.'s President, Mary Constant falsely certified that Moonbeam, Inc. was financially qualified in the initial application filed November 15, 1991, and/or again in an amendment filed March 2, 1992 and, if so, the effect thereof on Moonbeam's basic qualifications to be a Commission permittee/licensee.

2. The basis of Willson's petition was as follows:

- Ms. Constant's inability to produce a financial statement at the time of Willson's Supplemental Document Request;
- Technical amendments to the financial section of Moonbeam's application; and
- Moonbeam's failure to produce written agreements with its president, sole director and sole shareholder for the provision of funds.

Second Petition to Enlarge Issues, filed May 14, 1993 ("2Pet"), *passim*;

Opposition to Second Petition to Enlarge Issues, filed June 1, 1993

("Opposition"), *passim*.

3. In his June 15, 1993, Reply to Moonbeam's Opposition, Willson improperly attempts to expand the issues sought in his Second Petition, seeking the following issues:

- (1) Moonbeam in response to document production stated that Mary Constant had no personal financial statement. Now Moonbeam claims there is such a statement.
- (2) Moonbeam fails to submit the financial statement despite substantial and material questions raised by Willson.
- (3) Mary Constant states in her declaration that she reviewed her assets and liabilities and that the funds available in the Abbie & Bianco Retirement funds were available. The statement is carefully worded. There is no affirmative statement that her assets exceed current liabilities.
- (4) The Abbie & Bianco Retirement Fund statement reveals that, after taking into consideration likely tax liabilities, there will be insufficient funds available to meet the already low projected costs to operate and construct the station.

(5) There is no written agreement between Mary Constant and Moonbeam, Inc. as required by the Commission committing Ms. Constant to provide funds to the corporation or setting forth the terms of any loan to the corporation.

(6) During a recent (*sic.*) four-month period, there was a significant outstanding tax lien pending against Ms. Constant.

Reply, at 8. In addition to the fact that many of the foregoing enumerated paragraphs are incoherent as hearing issues and lacking in decisional significance to this proceeding, none of the foregoing issues were requested in Willson's May 14, 1993 Petition. Accordingly, this is new matter in violation of Section 1.45 of the Commission's Rules. *See Alvin L. Korngold*, 37 FCC2d 68, 73 n.13 (Rev. Bd. 1972); *SENClard Broadcasting System, Inc.*, 26 FCC2d 827, 833 (Rev. Bd. 1970); *Aljir Broadcasting Co., Inc.*, 12 R.R.2d 986, 987 (Rev. Bd. 1968); *Marbro Broadcasting Co., Inc.*, 7 R.R.2d 216, 219-220 (Rev. Bd. 1966)(striking issues first requested in reply supporting enlargement petition).

3. Further, Willson is engaging in "back-loading," saving his most specific allegations for reply to forestall opposition from his adversary. For example, Willson presents lengthy conjecture regarding the possible withdrawal penalties or tax liabilities Mary Constant may incur if she withdraws funds from the "Abbie and Bianco Retirement Account." (Reply at 3-4). Aside from the lack of any showing that the account might be subject to any restrictions, *see infra*, all of these arguments were available to Willson for use in its original motion. Section 1.45 and basic fairness requires that the Reply be stricken or Moonbeam be permitted to respond.

4. If permitted to respond, Moonbeam would demonstrate that, *inter alia*, Willson seeks to create an issue out of insubstantial inferences, smoke and mirrors. Primarily, Willson argues that Ms. Constant's declaration under oath that the funds reflected in the account statement provided (voluntarily) to Willson in discovery are now and were at the time of her application available for construction of the station somehow constitutes *evidence* that Ms. Constant was not financially qualified and lacked assets in excess of current liabilities at the time of her application and subsequent thereto. Reply at 3-4.

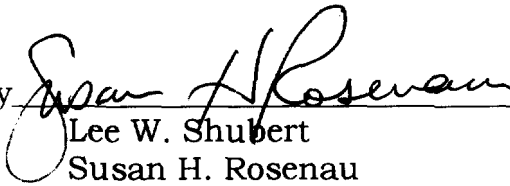
5. Willson further argues that tax penalties on the withdrawal of  
~~Ms. Constant's funds will leave her to become financially unable to~~

**CONCLUSION**

For the foregoing reasons, Moonbeam, Inc., respectfully requests that Willson's Reply to Opposition to Second Petition to Enlarge Issues, filed June 15, 1993, be stricken.

Respectfully submitted,

**MOONBEAM, INC.**

By   
Lee W. Shubert  
Susan H. Rosenau

Its Attorneys

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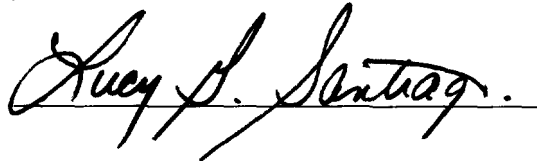
CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Second Motion to Strike was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered\*, to the following:

A. Wray Fitch, III, Esquire  
Gammon & Grange  
8280 Greensboro Drive  
McLean, VA 22102-3807

Administrative Law Judge Edward Luton  
2000 L Street N.W.  
Washington, D.C. 20036

Larry Miller, Esquire\*  
Federal Communications Commission  
Mass Media Bureau, Hearing Branch  
Suite 7212  
2025 M Street N.W.  
Washington, D.C. 20554

A handwritten signature in cursive script, reading "Lucy B. Santag.", is written over a horizontal line.

July 1, 1993